DATE: January 16, 1998

CASE NO: 95-INA-369

In the Matter of:

JOAN FIRST,
Employer

on behalf of

ALINA ROMANIUK
Alien

Appearance: PAUL W. JANASZEK
For the Employer and the Alien

Before: Guill, Jarvis, and Vittone
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

Decision and Order

This case arises from Joan First's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working

conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file, ("AF"), and on any written arguments. 20 C.F.R. § 656.27(c).

Statement of the Case

On November 22, 1993, Employer filed a Form ETA 750, Application for Alien Employment Certification, with the New Jersey Department of Labor ("NJDOL") on behalf of the Alien, Alina Romaniuk. The job opportunity was listed as Family Dinner Service Specialist Live-Out. NJDOL Assigned the occupational title of Cook, Domestic, Live Out. AF 4.

The job was advertised and Employer submitted a Report of Recruitment which indicated that there were no applicants for the position. AF 22. The file was transmitted to the CO. AF 27.

On September 20, 1994, the CO issued a Notice of Findings ("NOF") in which she proposed to deny the application. Among the reasons given for the denial were that: 1. The CO questioned whether the job constituted full time employment. 2. The proposed hours of employment were unduly restrictive and not the normal requirements for the occupation. AF 28-31. The CO required Employer to submit a rebuttal, which was to include specific evidence/documentation requested by the CO. Id.

Employer filed a timely rebuttal AF 33-37. On November 7, 1994, the CO issued a Final Determination ("FD") which denied Certification. AF 57. The CO found that Employer had failed to establish that the job was full time or establish business necessity for the restrictive hours. AF 53-56. Employer filed a timely request for review. AF 58-63.

Discussion

We first note that Employer's Request for Review contains material which was not submitted to the CO and cannot be considered on review. *University of Texas at San Antonio*, 88-INA-71 (May 9, 1988); *White Harvest Mission*, 90-INA-195 (Apr. 19, 1991); 20 C.F.R. § 656.27(c).

The NOF stated that:

> Employer indicates that the job opening is for a Household Cook, live-out and requires a work schedule of 40 hours per week, daily work schedule of 10:00 am - 7:00 pm. Pursuant to the Supplement to the Dictionary of Occupational Titles, the normal requirements for this occupation are 40 hours of work per week and a daily work schedule of 8:00 am - 4:00 pm or 9:00 am - 5:00 pm. AF 3a.

Employer included a schedule of duties as part of her rebuttal. AF 34-35. The FD found inconsistencies in the rebuttal:

> Employer's rebuttal indicates that she and her husband each own and operate their own businesses and their work day, in their respected places of business, begins at 10:30 am and ends approximately at 6:30 pm. They, both, then continue working at home during the evening.
>
> We note, employer states that the cook starts preparing breakfast at 10:00 am and breakfast consists of or may include "home-made omelet filled with a variety of stuffs as steamed vegetables, mushrooms, fruit, or meat such as steamed fish or other trim meats. It may include baked pastries as breads, rolls or fancy filled pastries as breads or rolls filled with vegetables, spinach, fruit, meat. These will be baked, roasted, poached steamed, seasoned, garnished and served with fresh juice of a bland of fruits and vegetables. All pastries and breads will be home-made by the employee.
>
> It is not feasible that a cook could start preparing breakfast, consisting of the above items, at 10:00 am and serve breakfast to the employer and her husband before that leave for work, if their workday begins at 10:30 am. In addition, employer states that her and her husbands workday ends at 6:30 pm and dinner is consumed between 6:30 pm and 7:00 pm. This statement indicates that neither the employer or her husband incur any traveling time from their respective places of business to their home. Employer then states, after dinner and clean up of the kitchen area the cook is free to leave. She will not be required to work overtime, but regular 40 working hours a week. According to the cook's schedule and the employer's business necessity documentation submitted, the employer and her husband consume dinner between 6:30 pm and 7:00 pm. It does not seem feasible that the cook would be able to serve dinner, clean the kitchen, the dinning area and the dinner dishes prior to 7:00 pm. Employer's work schedule contradicts the breakfast and dinner schedule of the cook. AF 43-44.

The Employer bears the burden of proof to establish that the Alien is entitled to certification. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b); Gerata Systems America, Inc., 88-INA-344 (Dec. 16, 1988) (en banc); Bijan Azadi & Associates, 94-INA-382 (Oct. 4, 1995). Employer has failed to meet this burden. In the light of the inconsistencies in the rebuttal, the CO properly denied certification for failure to establish business necessity for the restrictive hours.

Because of the disposition on the restrictive hours issue, it is not necessary to consider the question of whether the job was full time employment. The denial of Certification should be affirmed.

ORDER

The Certifying Officer's denial of labor Certification is Affirmed.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, California

DBJ/vr